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UNCLAS SECTION 01 OF 04 MADRID 000696

SIPDIS

DEPT FOR EB/IPC SWILSON/JURBAN DEPT PLEASE PASS TO USTR
BPECK, DOC ESCWHARZ, USPTO DLASHLEY-JOHNSON

E.O. 12958: N/A

TAGS: [ETRD](#) [KIPR](#) [SP](#)

SUBJECT: SPECIAL 301 RECOMMENDATION

REF: (A) STATE 23950 (B) MADRID 00007 (C) 2004 MADRID
04299

¶1. Summary: Piracy in Spain continues to be a major problem. The new government is formulating, in concert with stakeholders, an integrated plan against piracy (ref B). Industry is skeptical but is working actively with the government to fix some legislative loopholes and to encourage more effective enforcement. The GOS is willing to work with the USG on an IPR "roundtable". Spanish law enforcement agencies are active in combatting IPR piracy, but, to date, law enforcement actions have not had a discernible impact on IPR piracy levels. Local industry association representatives express greater frustration over piracy levels and some advocate Spanish inclusion on the 301 list. Our overall sense is that the Zapatero government is committed to fighting piracy. Given the government's formation of an integrated anti-piracy plan, work with industry on legislative issues, willingness to work with the USG on an IPR "roundtable", and the newness of the government (the Zapatero government took office after the last Special 301 determination), our recommendation is that Spain stay off the 301 watchlist this year. End Summary

CHARGE MEETING WITH VICE PRESIDENT TERESA FERNANDEZ DE LA VEGA

¶2. Charge emphasized the importance the U.S. attaches to effective IPR enforcement in a 2/22/05 meeting (septel) with Vice President Fernandez de la Vega who is, in effect, the Deputy Prime Minister of Spain. De la Vega clearly understood our message and was familiar with the issues. She said she had received a local industry federation the day before to talk about IPR matters and noted that it was a difficult task to work on because there was little public consciousness that IPR theft was wrong, let alone a crime.

OVERALL IP CLIMATE

¶3. MUSIC: The International Intellectual Property Alliance (IIPA) estimates piracy losses to be about USD 90 million in 2004. The Spanish Music Producers Association (PROMUSICAE) released a "White Book" on the music industry in Spain in early 2005, although most of the latest statistics contained in the white book are from 2003. The association estimates that in 2003, 24% of the CDs sold in Spain were pirated. There is no indication that this percentage changed significantly in 2004, despite a greater volume of police confiscations. Moreover, internet downloads probably increased in 2004. Artists saw a reduction in royalties of 37% between 2000 and 2003, and during the same period music producers cut employment by 20%. This is the background prompting music industry executives to say that their industry is in "crisis". PROMUSICAE says the future of the industry depends on developing new business models, technology and future legislation/enforcement. In October, 2004 iTunes opened for business in Spain, allowing consumers to purchase legal music online. Cellphone companies have developed technologies allowing for the downloading (legal) of digital quality music. So, there were some positive developments for the music industry in 2004. But the combination of the EU's highest level of street piracy (which probably affects music the most of all the IP industries) and developed world levels of internet piracy has frustrated the music industry. The government talks the talk. In fact, Minister of Culture Carmen Calvo signed a prologue to the white paper in which she says that the "public administration must be the guarantor of Intellectual Property Rights". But translating even fairly high levels of law enforcement activity into meaningful piracy level reductions remains a challenge.

¶4. VIDEOGAMES: Pirated games remain readily available even though IIPA notes that "there were more police actions against retail outlets selling counterfeit and pirated goods in 2004".

¶5. AUDIOVISUAL SECTOR: The IIPA estimates losses at USD 40 million. Pirated DVDs are readily available on the street,

subway stations and in bars and restaurants. An industry representative told EconOff that he has tried repeatedly to arrive at a deal with the bar and restaurant association, but the association will not return his calls. (Comment: Doing something about rampant sales of pirated audivisual and music products in bars and restaurants should be a priority. This business is dominated by Chinese vendors who frequent even upper middle class establishments to ply their wares.) The Spanish Federation for the Protection of Intellectual Property (FAP) is also particularly worried about internet piracy as the average time for downloading a movie declines to seven minutes with the latest ADSL connections.

16. SOFTWARE: The Business Software Alliance (BSA) estimates the 2004 piracy level to be 44%, down from 49% in 2003 but nonetheless one of the highest levels in the EU. Small companies, dealers and internet downloaders are the main software piracy perpetrators.

17. TRADEMARK ISSUES: Embassy is not aware of outstanding trademark issues affecting U.S. firms. Nike is still engaged in court battles with its former partner, but the specifically trademark-related aspect (i.e. who can use the trademark) of the company's decade-plus litigation is over.

PHARMACEUTICAL PATENTS

18. Spain's pharmaceutical patent problem is a legacy of its old process patent law which was in effect until October, 1992. From that point on, all pharmaceutical patents granted have been product patents. Pharmaceutical companies complain that non-innovative producers are able to easily obtain permission to produce "legal copies" of their process patented drugs if they make minor changes in the production process. Like other countries that have a recent history of process patents, this is a problem that only time will solve. For the next seven years the legacy of the old patent system will continue to irk pharmaceutical companies, but until all process patents are expired, we do not anticipate a significant change in the situation.

19. U.S. pharmaceutical companies operating in Spain recently assumed leadership positions the Spanish pharmaceutical association, Farmaindustria. American companies in Spain are concerned about government tax and pricing policies affecting the industry that might have an especially deleterious effect on the R&D based industry. In fact, these policies are the U.S. firms' principal concerns, rather than traditional clearly IPR and/or TRIPs-related commitments undertaken by the GOS.

POLICE ENFORCEMENT EFFORTS

10. In 2004, the National Police conducted 982 raids and 1,304 arrests, up from 488 raids and 733 arrests in 2003. The Madrid Municipal Police confiscated 1.6 million items and conducted 390 raids in 2003. The Municipal Police confiscated roughly 1.2 million items in 2004 and conducted 256 raids in 2004, a downturn. We do not currently have numbers for other law enforcement entities. The important thing to take away from these actually quite impressive levels of law enforcement activity though is that they do not have a significant deterrent effect. This is probably because there were very few convictions resulting in meaningful jail sentences and/or fines. Most arrestees are released after a few days and given a court hearing date months later. For the pirates, police enforcement is really just a minor cost of doing business. In theory, the tougher penal code (effective since October 1, 2004) gives the police the tools to go after pirates as they can do so ex officio. And judges have the option of stiffer sentencing. But in practice, the courts lack of interest in IPR crimes complicate the effort to mount a meaningful enforcement campaign.

EDUCATION EFFORTS

11. In January, 2005, Minister of Culture Carmen Calvo participated in an event called "Days of Training for Professional Experts in the Study of Phonographic and Videographic material". This was a major event receiving extensive press coverage and focused on piracy. In May, 2004 Spain attended an Interpol and World Customs Organization (WCO) conference on counterfeiting.

ANTI-PIRACY INITIATIVE

12. The Minister of Culture announced on 12/29/04 the GOS's "Integrated Plan for the Reduction and Elimination of

Activities Violating Intellectual Property". The plan, which is still being finalized in consultation with industry, involves coordinating 11 different Ministries in an effort to reduce piracy. Culture Ministry Under Secretary Antonio Hidalgo told visiting Commerce Assistant Secretary William H. Lash, III on 2/17/05 (septel) that the fact that the Culture Ministry had managed to corral 11 ministries into collaborating on fighting piracy showed that Zapatero himself was interested in the issue - otherwise most of the ministries would not be willing to participate. The plan involves creating an Interadministrative Commission to coordinate IPR protection; describe piracy problem in all its aspects; conduct public education campaigns; regulatory/legislative reform; and law enforcement/judicial training. (Comment: Some of this work is probably redundant, but nonetheless it is worthwhile noting that all the relevant industry sectors are cooperating with the government on this initiative.)

PROPOSED U.S.-SPAIN IPR ROUNDTABLE

¶13. Commerce Department Assistant Secretary Lash and Deputy Assistant Secretary Eric Stewart conducted meetings with industry representatives, the Industry, Tourism and Trade Ministry, the Culture Ministry, and the National Policy on February 17. Lash proposed the organization of a U.S. - Spain IPR Roundtable in Spain sometime in 2005. All GOS interlocutors accepted in principle. The Culture Ministry will probably take the lead for the GOS on this event.

REGULATORY/LEGISLATIVE FIXES NEEDED

¶14. Internet Service Providers (ISPs) are only obliged to take action against pirates if they have "effective knowledge" of piracy. Spain's e-commerce law defines two ways for ISPs to have "effective knowledge". A court order can provide such knowledge, but it is time consuming to get an order. The Spanish e-commerce law also provides for the possibility of using an administrative mechanism, but content providers are not clear on how to avail themselves of this mechanism. Culture Ministry officials told A/S Lash that they would work on clarifying the administrative route towards providing "effective knowledge" to internet providers. They said this can be done through regulation, rather than legislatively. This is of enormous practical interest to, for instance, the music industry. In Spain, the most important ISP is Telefonica. Industry complains that the current legal environment does not provide sufficient incentive for the telecoms giant to clamp down on pirates. Given that the current "killer application" (i.e. most sold) in the internet world is a program allowing for music downloads, industry frustration on this issue is mounting.

15 The law transposing the EU Copyright Directive contains two serious weaknesses according to industry representatives. First, it defines copying too narrowly. The current draft says copying is fixing a work so that it can be communicated and copied. Industry wants an and/or definition of copying. Industry also wants permitted copying for private use to be limited and for the copiers not to overcome anti-circumvention devices.

ONGOING AREAS OF REVIEW

¶16. OPTICAL MEDIA PIRACY REGULATIONS: Article 25 of Spain's IP legislation establishes a tax on optical manufacturing equipment; operators are required to apply for licenses. There is no legislation requiring that Source Identification Codes (SID) be used on locally manufactured CDs. Despite this, however, 12 out of 13 Spanish compact disc manufacturers have signed SID accords with Philips and IFPI.

¶17. USE/PROCUREMENT OF GOVERNMENT SOFTWARE: As previously reported, in 2000 the GOS published guidelines entitled "The Intellectual Property of Software Programs." These guidelines are for government ministries and outline measure, recommendations and good practices for acquiring and using software. The guidelines have been explained in workshops and are widely available to Spanish government officials, including on the internet.

18 TRIPS COMPLIANCE: The GOS counts itself in complete compliance with TRIPS since 1997.

¶19. ENFORCEMENT: See para. 9 above.

COMMENT

120. The Spanish IPR piracy picture is an amalgam of Third World and First World. Readily available pirated products on the street, in subway stations, bars, and restaurants resemble the Third World. Internet levels of piracy approach the most advanced countries in the world. Clearly, this government takes this issue seriously, but it will take sustained education, law enforcement, legislative and regulatory efforts to bring piracy levels down appreciably. On balance, we think this government should have another year off the watchlist to work on IPR piracy. But no matter happens with respect to Spanish inclusion or non-inclusion, Embassy Madrid will urge the GOS to focus on the following actions.

1A. Appropriate-level participation in a U.S.-Spain IPR Roundtable.

1B. Creation of an effective administrative mechanism to compel ISPs to shut down pirates.

1C. Legislative fixes to the proposed law transposing the EU Copyright Directive.

1D. Work with bar/restaurant associations to keep pirates out of such establishments.

Work with subway authorities as well.

Given many entertainment industry stars' open preference for the Socialist government (it is significant, for instance, that Zapatero attended the Spanish equivalent of the Oscars), it is possible that this government will be especially sensitive to doing something for this sector. We will need a year or so to see if this sensitivity translates into results.

MANZANARES